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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92053509
Party	Plaintiff Cleveland State University
Correspondence Address	COLLEEN F GOSS FAY SHARPE LLP 1228 EUCLID AVENUE, THE HALLE BUILDING 5TH FLOOR CLEVELAND, OH 44115 UNITED STATES uspto@faysharpe.com,cfgoss@faysharpe.com,jfry@faysharpe.com, djacquinot@faysharpe.com, chutter@faysharpe.com, docketing@faysharpe.com, dlightbody@fays
Submission	Opposition/Response to Motion
Filer's Name	Colleen Flynn Goss
Filer's e-mail	cfgoss@faysharpe.com, jfry@faysharpe.com, mmasterson@faysharpe.com, bwerner@faysharpe.com, uspto@faysharpe.com
Signature	/colleenfgoss/
Date	12/06/2013
Attachments	PETITIONER CLEVELAND STATE UNIVERSITY_S COMBINED OPPOSITION TO REGISTRANT_S MOTION FOR LEAVE AND MOTION TO STRIKE REGISTRANT_S BRIEF.pdf(21586 bytes)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the matter of Registration No. 3,735,435
For the mark UNIVERSITY OF CLEVELAND
Registered: January 5, 2010

Cleveland State University, Petitioner, v. CampusEAI Consortium, Registrant.	)	Cancellation No. 92053509

PETITIONER CLEVELAND STATE UNIVERSITY'S COMBINED OPPOSITION TO REGISTRANT'S MOTION FOR LEAVE AND MOTION TO STRIKE REGISTRANT'S BRIEF

Cleveland State University (hereinafter – "Petitioner"), through its attorneys of record in this matter, hereby responds to CampusEAI Consortium's (hereinafter – "Registrant") motion "for leave to file registrant's reply to petitioner's trial brief" and to strike the untimely filed trial brief from the record.

Registrant's Brief was due October 2, 2013, but Registrant failed to file its Brief and failed to request additional time for filing by this day. The Order mailed December 20, 2012 established the current Trial Schedule for this matter and indicates that the date set for the close of rebuttal testimony was to end on July 3, 2012. Additionally, Trademark Rule 2.128(a)(1) indicates that the party in position of plaintiff shall file its brief not later than sixty (60) days after the date set for close of rebuttal testimony. 37 CFR § 2.128(a)(1). The brief of the party in the position of defendant, if filed, shall be due not later than thirty (30) days after the due date of the

first brief. *Id*. Therefore, the Order placed Petitioner's trial brief to be due before Monday September 2, 2013 (60 days from close of rebuttal testimony[1]) and Registrant's trial brief to be due before Wednesday October 2, 2013 (30 days from the due date of the first brief).

Registrant's "Leave to File Registrant's Reply to Petitioner's Trial Brief, *Instanter*" and "Registrant's Reply to the Petitioner's Trial Brief" was actually filed on November 6, 2013 which was 35 days late. Thus, Petitioner urges the Board to deny Registrant's motion to reopen its expired time period and to strike the late filed brief from the record.

TMBP 509.01 outlines the adoption of Fed. R. Civ. P. 6(b)(1)(B) in which the Board, in its discretion, may permit a party to reopen an expired time period where the failure to act is shown to be due to excusable neglect. See Fed. R. Civ. P. 6(b)(1)(B). Such a determination is an equitable one that must take into account all relevant circumstances surrounding the party's omission including, but not limited to, 1) the danger of prejudice to the nonmovant, 2) the length of the delay and its potential impact on judicial proceedings, 3) the reason for the delay, including whether it was within the reasonable control of the movant, and 4) whether the movant acted in good faith. *Pumpkin Ltd. v. The Seed Corps*, 43 USPQ2d 1582, 1586 (TTAB 1997)(citing *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380 (1993)). "While prejudice, length of delay, and good faith may have more relevance in a closer case, the reason-for-delay factor will always be critical to the inquiry." *Lowry v. McDonnell Douglass Corp.*, 211 F.3d 457, 463 (8th Cir. 2000).

Turning to the first prong of this analysis, the Petitioner has experienced more than a mere inconvenience as Registrant's untimely conduct and reluctance to participate in this proceeding have been pervasive, substantial and have permeated throughout the duration of this

[1] Sixty days from July 3, 2013 actually falls on September 1, 2013 (which is a Sunday). Trademark Rules have allowed for this date to actually extend to Monday, September 2, 2013.

proceeding. In fact, this is the second time Petitioner has been forced to expend additional resources due to Registrant's untimeliness and reluctance to participate in this proceeding. More particularly, Registrant previously failed to participate fully in the discovery process adopted by this Board and has yet to provide sufficient responses to each of Petitioner's discovery requests.

As outlined in Petitioner's Motions to Compel Discovery filed on November 15, 2011 (Record Document No. 5), and Petitioner's Opposition to Registrant's Motion for Enlargement of Time to File a Response to Petitioner's Alternative Motion For Discovery Sanctions in the Form of Judgment filed on March 19, 2011 (Record Document No. 11), this was not the first tardy and/or deficient response provided by Registrant and it was likely not to be the last. This latest failure to file the arguably most important document in this case, one which Registrant had more than enough time to draft, continues to prejudice Petitioner by drawing this proceeding out to what seems to be the latest possible moment. Petitioner actually believed that Registrant had finally conceded its meritless case after providing no relevant or usable evidence during the testimony period, submitting no notice of reliance, and failing to timely respond to Petitioner's Main Brief. Additionally, Registrant's late filed brief is a futile attempt to rely on evidence that was not made of record.

Conversely, Petitioner has labored to comply with every rule and to meet each scheduled date ordered by this Board while Registrant has flaunted participation with these proceedings at each turn along the way. Petitioner has been prejudiced due to its continued ongoing compliance with the rules while acceptance of Registrant's extremely late filed brief will be another example of the rules not applying to this Registrant. Therefore, the first prong of the "excusable neglect" analysis weighs in favor of Petitioner because the undue delay and Registrant's chronic tardiness have already and continue to prejudice Petitioner.

Turning to the second prong, the length of the current delay of this Registrant filing is 35 days. Registrant's trial brief would have been timely filed by October, 2, 2013 but, instead, was filed on November 6, 2013. This delay on its own is lengthy enough to be prejudicial and obviously will delay the remaining judicial proceedings. In addition to the time between the close of discovery and the filing of Registrant's motion to reopen, there is the additional, unavoidable delay arising from the time required for briefing and deciding such motions. *See PolyJohn Enterprises Corp. v. 1-800-Toilets Inc.,* 61 USPQ2d 1860 (TTAB 2002).

Registrant did not file its Brief a few hours or days late; this is not a mailing or notice error. Instead, Registrant's brief was a full 35 days late. Registrant's delay in its ordered participation of this case, together with Petitioner's time and Board resources committed to arguing and deciding this motion to reopen, is detrimental to the orderly administration of the petition process and further judicial proceedings. Therefore, this factor also weighs in favor of the Petitioner.

As to the third factor, the reason for the delay is the most important factor when determining whether to grant or deny a motion to re-open. *Lowry*, 211 F.3d at 463. Registrant indicated that the reasons for its untimely filing are exclusively due to the fact that Registrant's executives were traveling to or because they are permanently located in India and were therefore unable to meet with Registrant's counsel. However, this reasoning is irrelevant and not persuasive to excuse its negligence. A meeting could have been scheduled with these executives in any number of ways to discuss this case. Current technology allows for client meetings in a many number of ways which includes communication over the phone, internet, Skype®, email, text message, or a variety of other available tools.

Moreover, Petitioner is unsure of what possible further input Registrant's executives could have possibly provided for Applicant's counsel to timely draft the Brief. Additionally, all factual evidence that was sought to be entered into the record by Registrant was required to be properly submitted by notice of reliance before the end of Registrant's 30-day trial period on May 19, 2013. As of today, Applicant has failed to take any testimony and failed to submit a notice of reliance.

Further, Registrant was in no way prevented from seeking an extension of time to file its brief before such time expired. The reasons relied upon by Registrant were within Registrant's reasonable control and simply did not prevent Registrant from filing a timely brief, or filing a timely request to extend the briefing period prior to expiration of the period. The failure to seek an extension of time prior to its close "appears to have been a result of a strategic decision, which was entirely within [its] control." *See Luster Products, Inc. v. John M. Van Zandt d/b/a Vanza USA*, 104 USPQ2d 1877 (TTAB November 28, 2012) [precedential]. Accordingly, the third factor weighs heavily in favor of the Petitioner because all of Registrant's reasons for delay are irrelevant, meritless or within the complete control of Registrant, and would not apply to an argument of excusable neglect.

Finally, Registrant explicitly states in its motion to re-open that he has "sought and received ZERO extensions for ZERO days in this matter to date" (Record Document No. 23). However, this statement is patently false. Registrant previously sought an extension of time via its Motion for Extension of Time filed on March 12, 2012 in which he made the exact same claim of "ZERO extension for ZERO days" (Record Document No. 10). Subsequently, the Board carefully considered the arguments of both parties with regard to this motion and found there was "good cause" to grant the 15 day extension of time to March 27, 2012 (Record Document

No. 12). Therefore, in light of these facts, it is befuddling why Registrant submits to the Board the false statement that they have "sought and received ZERO extensions for ZERO days in this matter to date." This appears to be an attempt to mislead the Board.

Therefore, due to the patently false statement submitted to the Board by the Registrant and the recurring deficient and delayed responses provided by the Registrant, it is submitted that Registrant's repeated level of conduct is indicative of a lack of respect for this process that rises to a level of bad faith. Therefore, the fourth factor weighs in favor of the Petitioner.

Accordingly, Registrant's request to reopen its time to file a trial brief should be denied and the untimely filed reply brief should be stricken from the record.

Dated: December 6, 2013

Respectfully submitted,

FAY SHARPE LLP

/s/ Colleen Flynn Goss

Jude A. Fry
Colleen Flynn Goss
The Halle Building, 5th Floor
1228 Euclid Avenue
Cleveland, Ohio 44115
Phone: (216) 363-9000
Fax: (216) 363-9001
E-mail: jfry@faysharpe.com
cfgoss@faysharpe.com
uspto@faysharpe.com

Attorneys for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on December 6, 2013**,** the foregoing **PETITIONER CLEVELAND STATE UNIVERSITY'S COMBINED OPPOSITION TO REGISTRANT'S MOTION FOR LEAVE AND MOTION TO STRIKE REGISTRANT'S BRIEF** was filed electronically. Notice of this filing was served by electronic mail on counsel for the Registrant per the agreement of the parties:

Michael DeJohn, Esq.
Michael_dejohn@campuseai.org
CampusEAI Consortium
1111 Superior Ave., Suite 310
Cleveland, Ohio 44114-2225

/s/ Colleen Flynn Goss
Colleen Flynn Goss
Attorney for Petitioner

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